NATIONAL LABOR RELATIONS BOARD

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AMERICAN FOREST AND PAPER ASSOCIATION
SOUTHERN CONFERENCE

FALL MEETING

PROMOTION OF COOPERATIVE RELATIONSHIPS BETWEEN LABOR AND MANAGEMENT: POLICIES OF THE NATIONAL LABOR RELATIONS BOARD

Delivered by:

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Marriott Marquis
Atlanta, Georgia

It is good to be with you here in Atlanta and to have the opportunity to discuss the Board's recent work. I thank the American Forest and Paper Association for this invitation to be with you today, and I want to take this opportunity to commend you for your constructive and cooperative relationships both in the union and non-union environment. The fact that 100 companies are members of your organization at 320 plant locations is testimony to your good work and labor in the vineyards of sound industrial relations.

I am particularly grateful to Marvin Waters, Manager of Employee Relations for the Association, for extending this invitation to me. Mr. Waters and I first met almost 15 years ago when I rendered an arbitration award1 upholding the union position! In arbitration, as in our work at the Board, the attempt of third party neutrals is to be balanced and fair and faithful -- in the former instance to the collective bargaining agreement and, in the latter, to the National Labor Relations Act.

I have looked forward to this opportunity for sometime -- though I confess that, notwithstanding the preeminence of the Atlanta Braves in the 1990s, I could not have completely anticipated the fact that my speech to you here today would coincide with last night's fifth game of the World Series between the Atlanta Braves and the New York Yankees.

I am relatively dispassionate about the outcome. Notwithstanding my devotion to the Boston Red Sox and their long-standing rivalry with the New York Yankees, this group of the Yankees seems like such a nice group of people -- Wade Boggs, of erstwhile Fenway days, Derek Jeter, and Bernie Williams present such a different image than did the Bronx Bombers of my youth in the '40s and '50s, as well as the fateful '70s and that nightmarish High Noon of October 2, 1978 for which Bucky Dent is notorious! And the Braves, whom I recall from previous World Series in both Boston and Milwaukee, may have the best front line pitching ever put together in the history of the game! These are two very fine and distinguished teams indeed!

I could not discuss baseball and the glorious 1996 World Series without noting that some members of Congress have sent me a number of interrogatories about my attendance at baseball games. As I told Senator Ashcroft of Missouri on September 17 of this year in Senate Oversight hearings, I do not seek a confrontation with anyone in Congress -- and I do not see it as part of my role to provoke any member of Congress. Nor did I know that the World Series would be played in Atlanta at the time when I accepted your kind invitation.

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1 *Weyerhauser Company, Oklahoma and Arkansas Regions*, 78 Lab. Arb. 1109 (1982). This decision, like my earlier award in *Basic Vegetable Products, Inc.* 64 Lab. Arb. 620 (1975) arose under special procedures attuned to employment discrimination matters. See generally William B. Gould IV, *Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U. PA. L. REV. 40 (1969); Youngdahl, *Suggestions for Unions Faced with Liability Under Title VII of the Civil Rights Act of 1964,* 27 ARK. L. REV. 631 (1973).

But I must confess that the coincidence of my speech here and the World Series is wonderful serendipity! And I cannot fail to note that I shall try to attend *any* baseball game -- let alone a World Series game -- when I am in a city where a game is being played in major league or minor league or at college level.

If possessing a passion for this great game -- in my view the world's greatest game -- is a crime or sin, then I plead guilty to it! And I shall continue to attend baseball games, whether on speaking engagements or not, whenever I have the chance so long as they do not interfere with my official duties . So thanks you very much indeed for bringing me to Atlanta at this propitious time.

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As you know, I am slightly beyond the half-way mark in my tenure as Chairman of the National Labor Relations Board. From the beginning, my hope has been to carry forward the great tradition of the National Labor Relations Board and to make a mark which promotes stability and balance in labor-management relations as well as one which makes Washington more attuned to the realities of the collective bargaining process that you confront on a daily basis, as well as the problems that exist for our dedicated core of regional personnel, both here in Atlanta, and throughout the United States.

This morning, I want to talk to you about three steps that we have taken to achieve these objectives. The first, chronologically and perhaps the most fundamental of all, was the creation of advisory panels composed of 50 of America's most distinguished labor lawyers -- 25 of the top union labor lawyers and 25 top attorneys who represent employers. These panels serve *pro bono* and meet twice each year to provide practical advice to the Board on key issues and policies. The most recent meetings were held June 18 and 20 of this year.

I want to thank the Atlanta members of the advisory panels for their very important work -- on the union-side, Bob Giolito and, on the management-side, Curtis Mack. And I also want to thank Lawrence Ashe of Paul, Hastings, Janofsky & Walker for his sage counsel both prior and subsequent to my appointment as Chairman. Lawrence Ashe, with whom I had the pleasure of attending last night's Braves/Yankees game, has been a wise and valued friend for more than a decade!

Next January, when we will meet again with the advisory panels, we will discuss some of the Board's procedures in handling representation cases with the intent of improving them. One of the issues that we will be dealing with involve the circumstances under which the Board might hold elections without resolving all questions of employee eligibility, i.e., the circumstances under which decisions relating to employees whose vote is challenged can be postponed until subsequent to the vote in the hope that, in some circumstances, the number of employees in dispute may be less than the margin of victory or defeat for the "yes" or "no" votes in the Board-conducted election. Again, as in

rulemaking and so many other areas, our goal is to streamline the process and diminish wasteful litigation.

As has been the case in connection with other reforms that we have pursued, we will want to get the widest possible input from both union and management lawyers, from yourselves, and the public generally. As you may know, these meetings are public, a transcript is kept, and we solicit views from all of our people at the Board, in the regions and in Washington, as well as from union, management and individual employee representatives in the public generally.

Because of my work as a private practitioner, representing both management and labor, impartial arbitrator and labor law professor, I always have been concerned with providing decision and opinion makers with direct contact with the practical problems involved in labor litigation and negotiations. My judgment is that we have been well informed and advised by the individuals of our advisory panels who confront day-to-day real life problems in the field. By the same token, these distinguished practitioners have gained in sights into the problems that the Board faces as an independent, quasi-judicial agency.

The second reform relates to settlement judges. As you may know, our agency has a very good reputation in settling the bulk of unfair labor practices and representation matters that come before us in the regions. But, in the unfair labor practice arena, once the battle lines are drawn, as the hearing grows near, the prospect for settlement diminishes considerably.

Thus, initially on an experimental one-year trial period on February 1, 1995 and then, as a result of favorable results from these new procedures, on March 1, 1996, we have made it possible for the Chief Administrative Law Judge, in appropriate cases, to appoint a "settlement judge." This settlement judge does not have the authority to adjudicate but rather is involved in an attempt to mediate and conciliate through working informally with the parties in an effort to reach a settlement of the outstanding unfair labor practice matter -- thus avoiding the cost to the parties, and the public and the delay required by formal hearing and possible appeals. If a settlement is not reached informally, the case proceeds to a hearing before a judge other than the settlement judge who is not privy to the parties' discussions -- all such discussions are confidential -- that have taken place under the auspices of the settlement judge.

Since the procedure began February 1, 1995, through the end of September 1996, settlement judges were used in 146 cases, and settlements were achieved in 99 of those cases, resulting in substantial savings to the Agency and to the parties in trial and possible appeal costs.

Settlement judge settlements were adversely affected in FY 1996 by the government shutdowns and by budget uncertainties. Until our budget was finally approved in April 1996, we were reluctant to spend limited travel funds for on-site settlement judge

conferences. Even thereafter, settlement conferences were curtailed because regional office staff was busy on backlogged investigations and trials. We did, however, with some success, continue to conduct settlement conferences by telephone. Now that the Agency is on a solid budget footing, we are returning to our normal full use of settlement judges.

Finally, we have attempted to promote more cooperative relationships between labor and management -- which are part and parcel of our advisory panels and the settlement judge procedures -- through a interpretations of Section 8(a)(2) -- the anti-company union provision of the statute which allows autonomous employee committees or employee-management organizations or teams to function wherever possible under the law.

In the summer of 1995, I addressed the question of whether such organizations can be regarded as unlawful in a separate concurring opinion in *Keeler Brass Automotive Group.*2 Though I found that the grievance committee in that case was a labor organization within the meaning of the Act, I explicitly stated that I would not find other employee groups to fall within the definition. I stated that I agreed with the Board decisions of the 1970s which had held employee participation groups not to be labor organizations.3 In those cases, the Board held that employee groups which rendered final decisions and did not interact with management performed "purely adjudicatory functions" which had been delegated to it by employers and thus did not "deal with" the employer within the meaning of Section 2(5) of the Act which defines a labor organization. I stated that I fully agreed with the Board's decision and rationale in those cases and that they are ". . . consistent with the movement toward cooperation and democracy in the workplace which I have long supported." I further stated:

> This movement is a major advance in labor relations because, in its best form, it attempts nothing less than to transform the relationship between employer and employees from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another. Such a transformation is necessary for the achievement of true democracy in the workplace. However, it does pose a potential conflict with the National Labor Relations Act, enacted in 1935 at a time when the adversarial struggle between management and labor was at its height.4

In *Keeler Brass* I concluded that the Committee, since it did not have the authority to adjudicate, was not covered by the precedent which I embraced in that opinion. Since it made recommendations about grievances and employment conditions -- recommendations about which the Committee was not the final arbiter -- it was a labor organization within

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2 317 NLRB 1110 (1995).

3 The cases of which I expressed approval are *John Ascuaga's Nugget*, 230 NLRB 275 (1977) and *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977).

4 317 NLRB 1110 at 1117.

the meaning of the Act. Accordingly, I then considered the question of whether the employer had unlawfully dominated or interfered with the labor organization in question.

In considering this issue I stated my approval of the U.S. Court of Appeals for the Seventh Circuit's approach to this issue in the landmark *Chicago Rawhide* decision.[5] The court established in that case, as I noted in my concurring opinion, a demarcation line between support and cooperation. As I said:

> The court defined support as the presence of 'at least some degree of control or influence,' no matter how innocent. Cooperation, on the other hand, was defined as assisting the employees or their bargaining representatives in carrying out their 'independent intentions.' The court went on to find that assistance or cooperation may be a means of domination, but that the Board must prove that the assistance actually produces employer control over the organization before a violation of Section 8(a)(2) can be established. Mere potential for control is not sufficient; there must be actual control or domination. The court set forth the following test: 'The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.' [Footnotes omitted.][6]

I said in *Keeler Brass* -- and say here again today -- that I approve of the Seventh Circuit's statement holding promoting good and cooperative relationships. I also agree that the subjective views of the employees must be taken into account as the Seventh Circuit said in both *Chicago Rawhide* and *Electromation*[7] -- but that to rely completely upon employee satisfaction would undermine extant Supreme Court precedent.[8]

Although the employee cooperative program in *Chicago Rawhide* originated with the employees, I said in *Keeler Brass* that an employee group does not have to originate with employees but can be promoted or suggested by the employer and not run afoul of the prohibitions against assistance and domination. As I said:

> I do not think these efforts are unlawful simply because the employer initiated them. The focus should, instead, be on whether the organization allows for independent employee action and choice. If, for example, the employer did nothing more than tell employees that it wanted their participation in decisions concerning working conditions and suggested that they set up a committee for such participation, I would find no domination

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5 221 F.2d 165 (7th Cir. 1955).

6 317 NLRB 1110 at 1117.

7 *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994) enfg. 309 NLRB 990 (1992).

8 *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 249 (1939).

provided employees controlled the structure and function of the committee and their participation was voluntary.9

Thus, I noted in *Keeler Brass* that the factors in favor of dismissal were that the employer did not create the committee in response to a union organizational campaign, that the committee was voluntary and employees were the voting members of the committee and all of them were elected by employees. Accordingly, I was of the view that there was some measure of free choice and "scope for independence." On the other hand, the fact that the employer set time limits for terms for membership, established eligibility rules and election procedures and conducted the election, announced the results of the election, dictated the number of employees who could serve on the committee, established meeting days and allowed special meetings to be held only with management approval argued in favor of unlawful domination. As I said:

> These elements of control indicates that the committee is not capable of action independent of the employer. Perhaps the most telling aspect of dependency is that the committee cannot even make a decision about when it will meet without prior approval from the employer.10

In a series of decisions -- many of which were chronicled in a speech that I gave in Indianapolis a half-a-year ago,11 I think that we have taken steps toward moving in this direction.

As I said last February, I think that this approach is consistent with the one outlined by President Bill Clinton in his State of the Union Message earlier this year when he said:

> When companies and workers work as a team, they do better.
> And so does America.

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9 317 NLRB 1110 at 1119.

10 *Id.* at 1119.

11 See William B. Gould IV, address to Indiana University School of Law Seventeenth Annual Seminar on Labor-Management Relations, *Beyond 'Them and Us' Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation*, Indianapolis, Indiana, reported in BNA, DAILY LABOR REPORT 42:E-38 (3/4/96). So far on my watch, the Board has issued 13 decisions which addressed the issue of under what circumstances employee-participation committees violate Section 8(a)(2): *Aero Detroit, Inc.*, 321 NLRB No. 136; *Autodie International, Inc.*, 321 NLRB No. 98; *Dillon Stores*, 319 NLRB 1245; *Hamilton*, 313 NLRB 1303; *Keeler Brass*, 317 NLRB 1110; *Meagan Medical*, 314 NLRB 1083; *Prime Time*, 314 NLRB 883; *Reno Hilton*, 319 NLRB 1154; *Simmons Industries, Inc.*, 321 NLRB No. 32; *Stoody Co.*, 320 NLRB No. 1; *Vic Koenig Chevrolet, Inc.*, 321 NLRB No. 168; *Vons Grocery Co.*, 320 NLRB No. 5 and *Webcor Packaging, Inc.*, 319 NLRB 1202. Four of these decisions, *Aero Detroit, Inc., Autodie International, Inc., Simmons* and *Vic Koenig Chevrolet, Inc.* issued subsequent to my Indianapolis speech.

In response to her inquiry about my views, I told Senator Dianne Feinstein on May 9 that I thought that the statute can be improved, although not along the lines of the TEAM Act, which would not have protected the autonomy of employer organizations, a fundamental prerequisite to genuine employee participation and cooperation between employees and employees. Like labor law reform itself, my sense is that this is an issue which will not go away and that it will be revisited by the Congress in the coming years regardless of the outcome of the 1996 elections.

My judgment is that there are certain starting points for an amendment to the Act.[12] The principle deficiency of the current law lies in its ambiguity. First, while the Act prohibits "financial" assistance or other "support," these terms are not self-defining. Literally, if an employer granted an employee committee the use of plant facilities, such as copying machines and meeting rooms, it would run afoul of the statute -- although it is unusual to find a violation on this basis. Second, in an even more bizarre way, the Act makes it unlawful to dominate or assist an organization that is concerned with employment conditions. At the same time, an organization in which the employees and employer representatives discuss so-called "managerial" matters such as product quality or sales is beyond the purview of the statute, thus immunizing the "top down" imposition of employee structures upon workers from legal regulation.

In a nonunion situation, the sensible response to all of this is to allow employee groups, with or without a management representative component, to discuss anything they want. The more workers know about the enterprise and the better they are able to participate in decision making, the more likely that democratic values and competitiveness are enhanced. And if the law is simplified, ordinary workers and small business people will be able to adapt to their own circumstances and avoid reliance upon wasteful, expensive litigation.

Employers should be able to promote creation and subsidization of employee groups. In the real world that is happening anyway. With workers unrepresented by unions in 85 percent of the workforce, how else can such systems flourish? Only in this way can workers have any voice in the foreseeable future in most enterprises.

The most important aspect of any change should be an assurance that such employee organizations will be autonomous -- that they can select their own representatives or leadership, determine what they want to discuss with management and how their organization should be structured. This does not mean that a ballot-box procedure must be used. But the employer that promotes such an employee group must be prepared to allow for genuine employee participation in leadership as well as involvement on employment issues.

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12 William B. Gould IV, *Wrong Way to Involve Employees,* ST. LOUIS POST-DISPATCH, July 2, 1996, at 11B, col. 2; and William B. Gould IV, *Giving Workers Short End of the Stick*, SAN FRANCISCO CHRONICLE, July 12, 1996, at A21, col. 2.

It is a pleasure to be with you here in Atlanta and to see so many old friends and to make new ones. I look forward to a dialogue with you about these and other matters today and in the coming years of my term. And may the best team win!

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